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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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May 1, 2017

By E-Mail and First Class Mail

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RE: Aerovox Facility – Compliance with TSCA

Dear Mr. Gill-Austern:

Thank you for your letter dated January 30, 2017, in response to EPA's October, 2016, letter concerning the Aerovox Site TSCA Determination and new conditions discovered at the Aerovox Site (the Site) during the 21E cleanup. While EPA disagrees with many of your conclusions, discussed briefly below, we look forward to continuing our cooperative relationship as we work toward our shared goals of cleaning up NBH and its primary source of contamination, the Aerovox Site.

AVX's letters, dated September 2, 2016, and January 30, 2017, articulate AVX's position that EPA's CERCLA and TSCA authorities are constrained by the AOC and the TSCA Determination, that EPA has no basis upon which it could exercise the reopener conditions in Section XXI of the AOC, and that AVX is therefore in compliance with the TSCA regulations. After reviewing both letters, and the relevant settlement documents as well as the Administrative Record for the NTCRA, EPA remains unpersuaded and maintains its position set out in our October 25, 2016 letter.

EPA appreciates AVX's work at the Aerovox Site and believes it is the intent of all parties involved with the Site (EPA, the Commonwealth, the City of New Bedford and AVX) that the cleanup be performed in compliance with all state and federal requirements and in accordance with the three separate settlement agreements concurrently entered into by AVX and each of the government parties. It is with that overall goal that EPA writes again to advise AVX that in order to come into compliance with TSCA regulations during the entire 21E cleanup, AVX should provide EPA's TSCA coordinator, Kim Tisa, with its revised Phase III submission for review and approval simultaneously with its filing of that document with MassDEP. EPA also notes that AVX has not yet provided Kim with a written response to her comments dated November 1, 2016, on the initial Phase III filing, although Kim has had some limited discussions

about these comments with your LSP. We assume that many of these comments will be addressed in the revised Phase III submission; however, AVX may also wish to contact Kim as it develops its revised Phase III document prior to its filing with the Commonwealth. In addition, AVX must also provide all future 21E submissions to EPA's TSCA program for review and approval to maintain compliance with TSCA regulations.

EPA's Continuing Role at the Site as Recognized in the AOC

As described in our October 25, 2016 letter, EPA continues to have a role at the Aerovox Site both during and after the 21E cleanup. We disagree that the AOC constrains our authority under CERCLA or TSCA as suggested by your letter. AVX, relying heavily on the TSCA Determination for the NTCRA to support its position that EPA negotiated away its CERCLA and TSCA authorities and that TSCA's role in the 21E cleanup ended with the conditions set out in the TSCA Determination, fails to recognize EPA's continuing statutory authority, as noted in the AOC.

For example:

- Paragraph 67 identifies AVX's post-removal site controls obligations, which are continuing obligations during and after the 21E cleanup as explained in our October 25 letter. These continuing obligations are further discussed in the O&M Plan and the TSCA Determination, which include ongoing reporting requirements to EPA, not voluntary reporting requirements as AVX states in its January 30 letter. These reporting requirements are independent of 21E reporting requirements;

- Paragraph 118 provides a covenant not to sue by EPA conditioned upon AVX's complete and satisfactory performance of its obligations under the Settlement Agreement and its obligations under the State/AVX settlement agreement;

- Paragraph 119, except as specifically provided by the Settlement Agreement, reserves EPA's right to "take, direct, or order all actions necessary to protect public health, welfare, or the environment or to prevent, abate, or minimize, an actual or threatened release of hazardous substances, pollutants or contaminants or hazardous or solid waste on, at, or from the Site.";

- Paragraph 121, as you know, reserves EPA's reopener rights based on unknown conditions or unknown information as described in that paragraph; and

- EPA's Notice of Completion of Work, issued on May 16, 2013, is subject to AVX's continuing obligations for post removal site controls and for meeting its state obligations. The Notice also specifically states that it doesn't alter any rights reserved by the United States under the AOC.

In addition, the AOC does not include a covenant not to sue or release by EPA of AVX from TSCA. Regardless of whether or not there is a TSCA Determination or a settlement document under Sections 106 and 107 of CERCLA, as long as regulated PCB contamination is present at the Site, EPA continues to have authority under TSCA at the Site. TSCA is a federal program which statutorily cannot be delegated by EPA to the State.

Compliance with TSCA

Again, referring to our October 25 letter, should site conditions change after the TSCA program has provided approval of certain work or after issuance of a TSCA Determination under § 761.61(c), the TSCA program re-evaluates regulatory compliance and prior risk-based determinations in light of the changed conditions. The discovery of DNAPL through AVX's 21E investigations and off-site migration of PCB contamination requires such a re-evaluation by the TSCA Program for protectiveness. Additional conditions may also be necessary. This is especially important given the ongoing discussions between EPA, the Commonwealth, and AVX, as well as a review of AVX's initial Phase III submission, and subsequent conversations between the parties which reveal that the anticipated 21E remedy may be chosen from alternatives that may no longer include a containment barrier as originally envisioned; instead a treatment barrier may be proposed that may or may not be effective in treating PCBs. As you know, EPA has expressed its concerns to AVX and MassDEP about the effectiveness, constructability, maintenance, and compatibility of this type of technology to achieve source control at the Aerovox Site. This, and other proposals such as onsite consolidation and in-situ chemical oxidation to address DNAPL, would represent a change to the anticipated 21E remedy upon which the TSCA Determination's conditions for its protectiveness finding was based.

Section XXII of the AOC

After reviewing your letter and the administrative record, EPA re-confirms that the discovery of DNAPL on the Site and the presence and migration of contamination off-site were unknown to EPA as of the effective date of the AOC and as set forth in the Action Memorandum and the administrative record supporting the Action Memorandum.

As a preliminary matter, the relevant standard of review is found in Section XXII of the AOC and provides EPA with a basis to exercise the reopener, should it decide to do so. To the extent AVX is relying on a different standard in its letters (e.g., whether EPA "should have known"), we disagree that AVX's suggested standard of review is correct.

Moreover, EPA has never performed an extensive evaluation of contamination at the Aerovox site, which is an EPA removal site. As you know, at a national priorities list site, consistent with the NCP, EPA follows the methods for investigating facilities at which hazardous substances, pollutants, or contaminants have come to be located. Section 300.430(d) of the NCP describes the types of investigations and data necessary to

characterize the site, such as field investigations, including treatability studies, and a baseline risk assessment. EPA's RI/FS guidance expands upon this section of the NCP, providing, in detail, the level of site investigations and types of activities EPA must conduct to characterize the nature and extent of contamination at a site.[1] The guidance is clear about the level of investigation needed to characterize site conditions. EPA has not undertaken these types of investigations at the Aerovox site; it wasn't until AVX began the current 21E investigations that DNAPL was discovered at the Site as evidenced by its reporting as required by the MCP and the resulting Immediate Response Action AVX conducted to address the DNAPL.[2]

As a basis for its assertions about EPA's knowledge of site conditions as of the effective date of the AOC and the scope of EPA's TSCA jurisdiction for the 21E cleanup, AVX cites to the following documents: Limited sampling results from 1983 conducted by a responsible party,[3] an EPA email that merely notes the location of that sampling on a map, the 2006 Aerovox Conceptual Site Model, and offsite sampling conducted by EPA in 2012 and 2015, which was needed to inform EPA about migration of DNAPL once it was discovered on the Aerovox site in 2011 (a data gap left unaddressed by AVX during its 21E investigations even though otherwise directed by MassDEP to address).

AVX appears to most heavily rely on the 2006 Aerovox Conceptual Site Model (CSM), a primary focus of AVX's August 15, 2006, comments on EPA's SEE/CA, to reinforce its claim about EPA's knowledge of site conditions.[4] However, AVX seems to take contrary positions: Its 2006 comments on the SEE/CA reflect AVX's position that the proposed removal action cannot possibly be effective or consistent with guidance and the NCP because the conditions at the site are not fully characterized, yet AVX now claims EPA knew about the DNAPL and the extensive contamination at the Site in 2006.

In fact, AVX itself, in its many of its 2006 comments on the SEE/CA, notes the speculative nature of the EPA's knowledge of site conditions. For example, on page 26 of AVX comments:

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[1] Guidance for Conducting Remedial Investigations and Feasibility Studies under CERCLA, Interim Final, EPA/540/G-89/004, OSWER Directive 9355.3-01 (October, 1988).

[2] EPA reserves and does not waive any rights it may have against AVX for the discovery of DNAPL on site and the offsite migration of contamination.

[3] EPA notes the 1983 test borings were only 3 of 29 taken on behalf of Aerovox, Inc. as part of a limited site study. The study area encompassed about ½ acre of unpaved Aerovox property, a 10-acre site, and in many borings below 2 feet, no samples were analyzed. (See Table 2-3, Draft Report Evaluation of Remedial Alternatives for the Aerovox Property New Bedford, MA, January 11, 1983, prepared by GHR Engineering Corporation for Aerovox, NTCRA Administrative Record #460561). In addition, with the exception of three borings, "None of the soil samples collected from below a depth of 6 feet were found to exceed 50 ppm PCBs." Id. at p. 2-6. According to the boring logs, the three borings noted by AVX (TB-22 and 22A, TB-24, and TB-26) are unspecified at a depth of somewhere between 1-8.5 feet depth, with a notation of "product" by someone at D.L. Maher Co., without evidence of sampling conducted.

[4] EPA notes that AVX did not submit any comments on the 1998 EE/CA or Proposed Plan EPA issued for the Aerovox NTCRA prior to the SEE/CA, nor suggest that additional action was needed.

Additionally, the 2006 CSM identifies the potential for DNAPL and groundwater impacts around and beneath the building at depth. *These impacts are unknown without further investigation* which will be required for any long-term remedial action. *The 2006 CSM concludes, somewhat speculatively*, that

> The historical release of separate phase PCB oil within the building and the surrounding area likely resulted in residual contamination of the soils beneath the site (pockets of oil filling in portions of the interstitial pore space between soil grains) as well as the potential for pools of oil residing above zones of lower permeability material. As the density of the PCB mixtures used at the site was greater than that of water (PBSs are classified as a dense non-aqueous phase liquid or DNAPL), PCB oils that historically drained through the soil could have continued a downward migration below the water table, potentially pooling above bedrock or the zone of low permeability peat identified beneath the site (confining layer in Figure 1-4) and moving laterally along the rock or peat layer (footnote deleted). (*emphasis added).*

AVX goes on to comment, on page 47:

> Elsewhere in the SEE/CA, EPA *acknowledges the site characterization is incomplete* and that long-term protection will be addressed under the state Chapter 21E program…..(*emphasis added)*

And

> But, in fact, *it is difficult to predict what the long-term remedy for the Site would be, given the current data gaps. Although the 2006 CSM attempts to identify sources, release mechanisms, migration pathways and exposure, the documents in the AR file do not adequately define the source, nature and extent of contamination, nor do they provide a risk assessment, i.e., they do not meet the MCP's Phase II Comprehensive Site Assessment requirements. Data gaps include: no evaluation of NAPL condition and NAPL transport; insufficient data points to confirm what is happening at and in bedrock surface…no TCLP or bench scale data to evaluate whether soil, building and contents to be placed in building foundation upon implementation of the recommended alternative would be a continuing source to groundwater; no temporal data upon which to discern trends; and insufficient information on sediments and sediment transport in storm sewer and box culverts. (emphasis added)* [5]

[5] See also page 18, discussing surface water flux ("…the surface water flux presented in the 2006 CSM utilized maximum, not typical, PCB concentrations and assumed storm flow based on visual observations, not on actual measurements….Without adequate characterization of these pathways and an evaluation of the flux based on actual existing conditions and site-specific measured physical parameters, information that would ordinarily would be collected as part of a comprehensive site assessment under the MCP, there is no basis for assertions of a substantial threat of release via groundwater or surface water."); page 31, (…The recommended alternative is a temporary measure. The SEE/CA states that 'EPA has not quantified

It was only through investigative studies performed by AVX pursuant to 21E that existence of DNAPL was discovered at the Aerovox site and through concurrent and subsequent sampling east of the sheet pile wall by EPA that EPA established that DNAPL has migrated from the site into NBH. As you know, EPA has not performed any type of remedial investigation studies of the Aerovox site (except for minimal groundwater and surface water sampling in the CSM) and has been relying on AVX, through the 21E program to adequately characterize the nature and extent of contamination at Aerovox in order for AVX to select a remedy that will result in complete source control at the Aerovox site before EPA can complete its cleanup of NBH.[6]

Re-Confirming Next Steps

EPA reiterates what it said in its October 25, 2016 letter:

> Through the 21E investigations undertaken by AVX, and sediment sampling conducted in 2012 and 2015 by EPA in the Acushnet River along the Aerovox Site shoreline, information about the presence of DNAPL and off-site migration of PCB contamination has been discovered that now requires the TSCA program to re-evaluate the TSCA Determination. The risk-based determination issued under TSCA may no longer be protective based on the newly discovered conditions at the Site, including the presence of DNAPL both on- and off-site and the off-site migration of PCB contamination. EPA's TSCA program will need to re-evaluate conditions and proposed actions to address PCB contamination both on- and off-site to determine whether or not TSCA regulatory requirements have been met.[7]

Accordingly, AVX should provide Kim Tisa, EPA's PCB Coordinator, with its revised Phase III submission for review and approval simultaneously with its filing of that document with MassDEP, as well as all future 21E submissions, in order to ensure compliance with TSCA. EPA would also emphasize to AVX the importance of both the Aerovox and New Bedford Harbor cleanups and the need for continuing cooperation and coordination to ensure successful cleanups at both sites.

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whether additional hazardous wastes are present at the site; however, the measures proposed will protect human health and the environment in the short-term. Long-term protection will be addressed under the state Chapter 21E program [footnote omitted]. If the proposed action is implemented, extensive work will be required to achieve long-term protection under the MCP, including full characterization of the nature and extent of potential impacts, source control..."} (see additional comments on pages 24, 31, 34 and 37.)

[6] See also EPA response #18 in the SEE/CA in response to a comment raising concerns about the scope of the removal action and whether the available information was sufficient to document "the full nature and extent of contamination", to which EPA replied that a full remedial investigation/feasibility study (RI/FS – a complete characterization of the nature and extent of contamination and a full range of alternatives) is not part of the removal process.

[7] The term "off-site" as used in this letter refers to any location not within the definition of "Site" as that term is defined in the AOC.

Should you have any questions about this letter, please contact me at (617)-918-1888.

Very truly yours,

Cynthia Catri

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